NO. 91-1600

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

HAZEN PAPER COMPANY, et al.,
Petitioners,

v.

WALTER F. BIGGINS,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the First Circuit

BRIEF AMICUS CURIAE OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT

PAUL H. TOBIAS *
Tobias, Kraus & Torchia
911 Mercantile Library Bldg.
414 Walnut Street
Cincinnati, Ohio 45202
(513) 241-8137
Attorney for
Amicus Curiae

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BRIEF AMICUS CURIAE OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION (NELA) IN SUPPORT OF RESPONDENT

The National Employment Lawyers Association respectfully submits this brief amicus curiae in support of Respondent in this case. The written consents of all parties have been filed with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

The National Employment Lawyers Association (NELA) is a nationwide bar association of over 1200 lawyers who represent individual employees. Its membership comprises a large segment of the leaders of the plaintiffs' bar who specialize in employment discrimination cases. Founded in 1985 and headquartered in San Francisco, California, NELA has members in 49 states. Because of its interest in the application of employment law, NELA has filed several amicus briefs in this Court as well as briefs before the Circuit Courts of Appeals and various State Supreme Courts.

Most of NELA's members regularly handle age discrimination cases. Many of NELA's members specialize in age discrimination practice.

Petitioners request this Court to legislate

a new standard to govern the award of liquidated damages in Age Discrimination in Employment Act (ADEA) cases. In addition to meeting the present "knew" or "reckless disregard" standard, the employee, according to petitioners, must show "that the employer's actions were repeated, without colorable justification, or were otherwise harsh, egregious or outrageous." (Petitioners' Brief at 47).

NELA disagrees. This Court should adhere to its recent well reasoned rulings in the Thurston and McLaughlin cases. This Court should resist efforts to create a new standard that has no basis in either this Court's rulings, legislative history or public policy.

Because of its practical experience with the issues at bar, NELA is well suited to brief this Court on the importance of the issue beyond the

immediate concerns of the parties to this case.

STATEMENT OF THE CASE

NELA's brief is confined to the issue raised by the decision of the First Circuit "to adopt without modification or qualification" the test for "willfulness" set forth by this Court in Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 128 (1985):

> A violation is "willful" if 'the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.'

Petitioners seek to modify the "knew" or "reckless disregard" test by adding heightened employer-protective standards, previously

rejected in Thurston. Petitioners claim the present standard improperly promotes an automatic doubling of damages in every case. They would permit liquidated damages only for "those cases involving the most flagrant violations of the law". (Brief for Petitioners at 47). Respondent disagrees, arguing that the current standard adequately preserves Congress' desire for a "two tier" approach, distinguishing ordinary and "willful" violations.

According to Respondent, the deterrent and compensatory purposes of liquidated damages are best served by the "knew" or "reckless disregard" standard. Respondent says there is nothing in public policy or legislative history to justify a tortured expansion of the statutory word "willful", to mean "outrageous".

SUMMARY OF ARGUMENT

This Court in Thurston rejected efforts to move the definition of "willful" closer to the traditional "bad purpose" test for imposing punitive damages. At the same time this Court pointed out circumstances where "reasonable" and "good faith" efforts of the employer to follow the law could insulate the employer from a finding of "willful" violation. The Court in Thurston and McLaughlin was satisfied that the "knew" or "reckless disregard" standard provided a proper demarcation between "ordinary" and "willful" violations that serves the purposes of the liquidated damages provision.

The "two-tiered system" envisaged by Congress was not designed to establish any particular percentage of "willful" versus non-willful violations. There is no legislative

history suggesting that liquidated damages should only be awarded in a very few cases or only in "outrageous" cases. To the contrary, legislative history shows that in addition to the deterrent purpose, one of the purposes of the liquidated damages provision was compensatory, designed to make up for non-pecuniary losses. Further, Congress was well aware of the option of using the words "punitive" or "malicious" but rejected the higher standard in favor of the "willful" language, which imposes a lesser burden on plaintiff. Thus, there is ample support for this Court's prior rejection in Thurston of an "evil motive or bad purpose" standard or of the necessity of showing Defendant "intended to violate the Act". Thurston, 469 U.S. at 126 n.19.

Petitioners argue that the Thurston - McLaughlin standard means that the doubling of

damages will be automatic in every disparate treatment case. Not so. Cases like Thurston, where the Company promulgated a policy discriminatory on its face, provide a good example where "reasonable", "good faith" reliance on legal advice may provide a legitimate defense to the claim of a "willful" violation. Other examples are reasonable good faith reliance on statutory exceptions such as the BFOQ, benefit plan, seniority, good cause, and coverage defenses.

Frequently, disparate treatment cases involve a showing of "intent" to discriminate by direct, circumstantial or indirect evidence. However, there are many ADEA cases in which age is a determining factor causing illegal discrimination where there may be no showing of intent. An employer's unconscious stereotyping,

reliance on cost cutting motives, or negligent review of lower level biased recommendations may cause illegal discrimination, but may not necessarily involve a willful violation. Thus, the fear of an automatic doubling of damages in every case is not justified.

In sum, there is no reason to reverse the 1984 and 1988 holdings of this Court in Thurston and McLaughlin. There is no need to "modify" the "knew" or "reckless disregard" standard. The addition of a new "outrageous" standard, created out of thin air, would unfairly deprive victims of age bias of appropriate relief and would diminish the deterrent desired by Congress.

ARGUMENT

I. Adding A New Heightened "Outrageous" or "Egregious" Standard Contravenes This Court's Rulings, And Is Unsupported By Legislative History, Public Policy, Or The Plain Meaning Of The Statute.

In Loeb v. Textron Inc., 600 F.2d 1003, 1020 n.27 (1st Cir. 1979) the court held that an employee had to establish that the employer had specific intent to violate the ADEA in order to receive liquidated damages. This Court in Thurston disagreed and said, "We do not agree with TWA's argument that unless it intended to violate the Act, double damages are inappropriate under § 7(b) of the ADEA". Thurston, 469 U.S. at n.19. Furthermore, the Court in Thurston adopted the position that an employer's action may be "willful" "even though he did not have an evil motive or bad purpose". Id.

The Thurston case stands for the proposition that the distinction between "ordinary" and "willful" violations is not whether the violation was "flagrant" or "malicious" or "outrageous", but rather, whether the employer had knowledge that its conduct was in violation of law. The McLaughlin case, decided only four years ago, reaffirmed the Thurston rule as a satisfactory explanation of "willful" violations in Fair Labor Standard Act (FLSA) cases. "Ordinary" violations included conduct that was merely negligent or based on a "good-faith but incorrect assumption" as to the law. McLaughlin v. Richland Shoe Co., 486 U.S. 128, 135 (1988). This Court noted in McLaughlin:

> The standard of willfulness that was adopted in Thurston - that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by statute-is surely a fair reading of the plain language of the Act.

Id. at 133.

Now the petitioners seek to modify the Thurston-McLaughlin approach and engraft a new requirement. They would force an employee to show not only knowledge or "reckless disregard," but also that "the employer's actions were repeated, without colorable justification, or were otherwise harsh, egregious, or outrageous."(Petitioners' Brief at 47). Neither the plain meaning of "willful", nor the authorities which have interpreted "willful" in many other statutes justify such a result. The petitioners' efforts are but another attempt to

resurrect the "bad purpose", "evil motive" standard rejected in Thurston.

Petitioners correctly note that liquidated damages were intended as a deterrent to prevent employers from violating the law. However, another purpose was compensatory. In its comments attached to the 1978 amendment of the ADEA, Congress specifically stated that liquidated damages were intended to "compensate the aggrieved party for non-pecuniary losses arising out of a willful violation of the ADEA". H.R. Conf. Rep. No. 950 95th Cong., 2d Sess. 13-14 (1978) reprinted in 1978 U.S.C.C.A.N. 504, 528, 535. Furthermore, the Committee Report noted that "the ADEA as amended by this Act does not provide remedies of a punitive nature". Id. In Overnight Motor Transportation Company, Inc. v. Missel, 316 U.S. 572, 583-84 (1942), this Court

noted that one purpose of liquidated damages in FLSA cases was to provide full compensatory relief for losses that are "too obscure and difficult of proof for estimate other than by liquidated damages."[1] This compensatory purpose would be thwarted if liquidated damages were only available in a few flagrant cases as proposed by petitioners.

It is simply inaccurate to equate liquidated damages with normal "punitive damages" like those available in Section 1981 and Section 1983 cases. (See EEOC brief at 20 n.11). There, the damages are uncapped. Under the ADEA, the

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[1]The lower federal Courts have held there is no recovery for compensatory, emotional, pain and suffering, or consequential damages Dean v. American Security Ins. Co. 559 F.2d 1036 (5th Cir. 1977) and in many cases only limited or no prospective damages are available. See e.g. Davis v. Combustion Engineering Co., 742 F.2d 916 (6th Cir. 1984).

Plaintiff is limited to an amount equal to the backpay due at date of trial, which normally may be a very modest amount. There is no windfall for the Plaintiff. There is no large financial exposure for the Defendant. There is no policy factor justifying limiting punitive charges to a few "outrageous" or "flagrant" cases.

II. The present "knew" or "reckless disregard" standard preserves the ADEA's two tiered system, distinguishes ordinary and "willful" violations and prevents any automatic doubling of damages.

Petitioners fear that retention of the Thurston rule will mean an automatic doubling of damages in all cases. Not so. As the Court provided in McLaughlin:

> If an employer acts reasonably in determining its legal obligation, its action cannot be deemed willful . . . . If an employer acts unreasonably, but not recklessly, in determining its legal obligation, then . . . it should not be [considered willful] under Thurston . . . .

McLaughlin, 486 U.S. at 135 n.13.

Trial judges give similar instructions pointing out that good faith employer actions that are unreasonable but not reckless are not necessarily "willful".[2]

Unconscious stereotyping of an older worker's abilities violates the Act but may not

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[2]"[G]ood faith, as well as reasonableness, clearly are factors which go into the computation of willfulness." 3 Howard C. Eglit, Age Discrimination 18-80 (1990).

be "willful". EEOC v. Century Broadcasting Corp., 957 F.2d 1446, 1458 (7th Cir. 1992); Syvock v. Milwaukee Boiler Manufacturing Co., 665 F.2d 149 (7th Cir. 1981). Another example is when the employer's decision to terminate a high salaried older worker is motivated solely by its desire to cut costs by replacing Plaintiff with a younger employer. See, e.g., Metz v. Transit Mix, Inc., 828 F.2d 1202 (7th Cir. 1987); Gilliam v. Armtex, Inc., 820 F.2d 1387 (4th Cir. 1987). Another frequent situation is when the articulated reason, although pretextual, would not have put upper level management, who reviewed the claim, on notice of discrimination. Blake v. J.C. Penney Co., 894 F.2d 274 (8th Cir. 1990). Furthermore, where an ADEA violation is merely "in the picture" the violation is not willful. Holzman v. Jaymar-Ruby, Inc., 916 F.2d 1298,

1304-05 (7th Cir. 1990).

In addition, employers who discriminate may nevertheless reasonably raise affirmative defenses, which permit a non-willful finding. Examples are:

1) Bona Fide Seniority System Defense, (29 U.S.C. Section 623(f)(2)(A));

2) Bona Fide Occupational Qualification (BFOQ) Defense (29 U.S.C. Section 623(f)(1));

3) The defense of no coverage because Plaintiff is a high ranking executive (29 U.S.C. Section 623) or Defendant has less than 20 employees (29 U.S.C. Section 630(b));

4) Bona Fide Employee Benefit Plan Defense (29 U.S.C. Section 623(f)(2)(B)).

An ADEA plaintiff can establish age discrimination without specific evidence of the employer's state of mind and without a showing of

specific intent to violate the law. Burlew v. Eaton Corp., 869 F.2d 1063 (7th Cir. 1989). As stated by the court in Brown v. M & M/ Mars, 883 F.2d 505 (7th Cir. 1989):

> It is possible that the relevant decision maker might not know about ADEA's prohibitions. More likely is a situation in which a low-level supervisor withholds any facts that might lead the relevant decisionmaker, higher up in the chain of command, to suspect discrimination. In either of these two cases, a jury could reasonably conclude, depending on all the circumstances present, that the employer's action was not willful.

Id. at 514.

Disparate impact cases, which require no proof of intent to discriminate, obviously do not necessarily lead to a finding of "willful" violation. An example is where the employer uses subjective methods of selection for a reduction in force. If the Plaintiff proves that employees age 40 or over are adversely affected, then the issue is whether there was "business necessity" for the method or whether other alternative methods were available. A finding of liability does not focus on "intent" to violate the law. Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988).

The Thurston case was not a disparate impact case because the policy covering treatment of 60 year old pilots was not neutral on its face but was age biased on its face. Nevertheless,

the Court in Thurston held there was no willful violation primarily because Defendant acted on the advice of legal counsel.

Legislative history derived from the Fair Labor Standard Act suggests that Congress intended liquidated damages to be awarded with more frequency than for traditional "punitive" damages available in Section 1981 and Section 1983 cases. The "willful violation" standard provides a lower burden of proof. Thus, it should be no surprise that many liability verdicts are accompanied by a finding of "willful" violation. As noted by the First Circuit, it is the "nature of the beast." Biggins v. Hazen Paper Co., 953 F.2d 1405, 1415 (1st Cir. 1992). More times than not, disparate treatment cases involve conduct which meets the "knew" or "reckless disregard" standard. The

commonality of "willful" misconduct is no reason to make the misconduct less blameworthy. But as previously shown there are many cases where the jury reasonably will not find a "willful" violation. Thus petitioners' fears of "automatic doubling" of damages are groundless. In all events, a large proportion of "doubling" verdicts alone is no justification for modifying an otherwise valid standard which is in accord with the purpose of the statute, its legislative history, and the plain meaning of the word "willful".

CONCLUSION

For the foregoing reasons, Amicus Curiae, National Employment Lawyers Association (NELA), respectfully submits that this Court should reject petitioners' contention that a new,

unnecessary, and illogical "outrageous" test be added to the well settled, salutary and balanced "knew" or "reckless disregard" standard.

Amicus Curiae submits that the First Circuit's decision should be affirmed.

Respectfully submitted,

Paul H. Tobias
Tobias, Kraus & Torchia
911 Mercantile Library Bldg.
414 Walnut Street
Cincinnati, Ohio 45202
(513) 241-8137
Counsel of Record for
National Employment
Lawyers Association

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing brief were served by U.S. Mail, first class, postage prepaid, to the following counsel, John M. Harrington, Jr., Robes & Gray, One International Place, Boston, MA, 02110, Counsel for Petitioners, and John J. Egan and Maurice Cahillane, 67 Market Street, Springfield, MA, 01102, Counsel for Respondent on this 3 day of September, 1992.

I further certify that one copy of this brief was mailed to each of the counsel for Amici, Kenneth W. Starr, Solicitor General, Department of Justice, Washington, DC, 205; Donald R. Livingston, General Counsel, Equal Employment Opportunity Commission, Washington, D.C., 20507; Douglas S. McDonell, attorney for

Amicus, Equal Employment Opportunity Commission; Mona Zeiberg, attorney for Amicus, Chamber of Commerce, and Cathy Ventrell-Monsees, attorney for AARP, 1909 K Street, NW, Washington, D.C. 20049, on this 2nd day of September, 1992.

Paul H. Tobias
Counsel for
National Employment Lawyers
Association (NELA)